IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JULIE ELLEN WARTLUFT, et al., Plaintiffs, v. THE MILTON HERSHEY SCHOOL AND SCHOOL TRUST, et al. Defendants.	Civil Action No. 1:16-cv-02145-JEJ (The Honorable John E. Jones)

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AND UNSEAL JUDICIAL RECORDS

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INTRODUCTION

Proposed Intervenor The Philadelphia Inquirer, PBC ("The Inquirer"), publisher of *The Philadelphia Inquirer*, respectfully submits this Memorandum of Law in support of its Motion to Intervene and Unseal Judicial Records. The judicial records at issue, which include the memorandum of law and other supporting documents submitted with Defendants' Motion for Summary Judgment ("Defendants' MSJ"), were electronically docketed under seal as docket entries 127, 135, 160, 161, 173, 174, 176, 196, 203, 204, and 205 (hereinafter the "Sealed Records").

The Third Circuit has long recognized a public right of access to judicial proceedings and records. Indeed, the existence of this right is "beyond dispute." *Littlejohn v. Bic Corp.*, 851 F.2d 673, 677-78 (3d Cir. 1988) (citations omitted). Integral and essential to the integrity of the judiciary, the public right of access to judicial proceedings is applicable in both criminal and civil cases. *Id.* at 678 (explaining that access in civil cases "promotes public confidence in the judicial system"); *see also Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659-60 (3d Cir. 1991). And it encompasses "more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records." *Littlejohn*, 851 F.2d at 678. Access is of particular importance where, as here, civil litigation has a component of heightened public

interest. *In re Cendant Corp*., 260 F.3d 183, 194 (3d Cir. 2001) (finding that, due to heightened public interest in a class action, the "test for overriding the right of access should be applied . . . with particular strictness").

The public has a particularly powerful interest in transparency in this case, which involves allegations of wrongdoing against the Milton Hershey School—a philanthropic boarding school for children from lower-income families—in connection with the death of a 14-year-old student once in its care. For the reasons set forth herein, The Inquirer respectfully requests that its Motion to Intervene for the limited purpose of challenging the sealing of the Sealed Records in this case be granted; that the Sealed Records be unsealed and made available to The Inquirer and the public; and, to the extent any party seeking closure is able to meet its high burden of showing that continued sealing is necessary as to some portion of the Sealed Records, that they be released with limited redactions.

PROCEDURAL HISTORY & STATEMENT OF THE FACTS

The Philadelphia Inquirer is an award-winning daily newspaper. It regularly publishes investigative reporting focused on Philadelphia and Pennsylvania, and frequently reports on cases pending in federal and state courts within Pennsylvania. It has extensively reported on allegations made against the Milton Hershey School and School Trust in this and similar pending lawsuits. *See, e.g.*, Bob Fernandez, *Hershey School house parents showed anti-gay video to a*

student, Phila. Inquirer (July 6, 2017), https://perma.cc/4H3U-7M2W; Bob Fernandez, *Did the Hershey School reject students for depression? Two suits say yes*, Phila. Inquirer (June 30, 2016), https://perma.cc/X6MV-DP4T. Public interest in these allegations is substantial; the Milton Hershey School, which provides tuition-free education to disadvantaged youth, is considered one of the nation's wealthiest charitable schools. *See* Victor Fiorillo, *Is Milton Hershey School to Blame for Abbie Bartels' Suicide?*, Phila. Magazine (July 1, 2016), https://perma.cc/3PCT-L8DL (noting that the school has an endowment of more than $10 billion).

This case arises out of the death of a 14-year-old student of Milton Hershey School and allegations by her estate and custodial parents ("Plaintiffs") that actions taken by the school led to her death. Plaintiffs initiated this lawsuit on June 29, 2016 in the Eastern District of Pennsylvania, alleging various tort and breach of contract claims, and seeking compensatory, actual, and punitive damages, as well as injunctive relief. ECF 1. The matter was transferred to the Middle District of Pennsylvania on October 25, 2016, ECF 21.

On March 10, 2017, the Court entered a stipulated protective order allowing the parties to designate information and documents exchanged during discovery as "confidential" when believed to be "of a proprietary or commercially sensitive nature, or should otherwise be subject to confidential treatment[,]" including

"Protected Health Information."[1] ECF 48 at 2. A similar protective order applicable to records obtained from the Pennsylvania Psychiatric Institute was entered on September 13, 2017. ECF 84. Additional protective orders applicable to records obtained from Philhaven and Leslie Davis and Pinnacle Health were entered on November 30, 2017. ECF 106, 108.

No documents were filed under seal in this matter until April 10, 2018, when a letter from unidentified counsel to the Court was docketed under seal. ECF 127. No order of the Court sealing that letter appears on the docket.

On April 16, 2018, Defendants filed a motion seeking leave to file certain documents under seal. ECF 134. Their memorandum of law in support of that motion was included among the documents that Defendants sought to seal. *Id*. The Court granted Defendants' motion on April 18, 2018, sealing the document at docket entry 135 and its two attachments. ECF 137. The Court's order sealing those documents sets forth no findings of fact to support sealing; the order indicates that Defendants' motion to seal is related to the March 10, 2017 protective order. *Id*.

On June 22, 2018, Defendants filed another motion seeking leave to file documents under seal. ECF 159. Their memorandum of law in support of that

[1] Pursuant to the protective order, "Protected Health Information" is "as defined by the Health Insurance Portability and Accountability Act of 1996 ('HIPAA')." ECF 48 at 2.

motion was included among the documents Defendants sought to seal. *Id*. On July 11, 2018, the Court granted Defendants' motion, sealing the documents at docket entries 160 and 161, as well as the 69 attachments to docket entry 161—the memorandum of law in support of Defendants' MSJ, along with all supporting materials. ECF 162. The Court's order further permitted Plaintiffs to file their response to Defendants' MSJ and supporting papers under seal, and permitted Defendants to file their reply under seal. *Id*. The Court's order sets forth no findings of fact to support sealing. *Id.*

On September 14, 2018, Defendants filed a motion seeking leave to file a statement of appeal under seal. ECF 195. Again, their memorandum of law filed in support of that motion was included among the documents Defendants sought to seal. *Id*. The Court granted Defendants' motion on September 17, 2018, sealing the document at docket entry 196 and its three attachments. ECF 198. The Court's order sets forth no findings of fact to support sealing. *Id.*

Several additional documents filed with the Court in this matter are also sealed, including the documents at docket entries 173, 174, and 176. The Inquirer is unable to discern from the public docket the nature of these filings, though it appears that at least one may be Plaintiffs' response to Defendants' MSJ. *See* ECF 176. A notice and accompanying exhibit filed by Plaintiffs regarding the submission of evidence related to Defendants' MSJ is also unavailable to the

public, *see* ECF 203, as are two documents described as "10/10/18 Fax from Counsel," ECF 204-205. No motions to seal or related orders from the Court sealing these documents appear on the public docket.

On or about October 10, 2018, Bob Fernandez, a reporter for The Inquirer who has been covering the above-captioned case, accessed the publicly available docket in this matter via the Court's online Public Access to Court Electronic Records ("PACER") website. Declaration of Bob Fernandez ("Fernandez Decl.") at ¶ 4. From the PACER website, Mr. Fernandez accessed and downloaded a PDF copy of ECF 203-1, the exhibit to docket entry 203. Labeled Exhibit 71, ECF 203-1 is a six-page "Finding of Probable Cause" by the Pennsylvania Human Relations Commission ("PHRC") in a separate matter in which the Milton Hershey School was identified as the Respondent. *Id*. Sometime after Mr. Fernandez obtained a copy of ECF 203-1 from PACER, it was made inaccessible to the public, and can no longer be viewed or downloaded from PACER. *Id*., ¶ 5.

The Inquirer now seeks an order from this Court unsealing these records. Counsel for The Inquirer has conferred with counsel for Plaintiffs and Defendant about the relief sought by this Motion. Counsel for Plaintiffs consents to the relief sought by this Motion. Counsel for Defendants have indicated that Defendants do not concur in this Motion.

STATEMENT OF QUESTIONS INVOLVED

1. May The Inquirer intervene under Federal Rule of Civil Procedure 24 for the limited purpose of challenging the sealing of judicial records in this action?

Suggested Answer: Yes.

2. Can Defendants meet their heavy burden of demonstrating compelling interests sufficient to overcome the strong presumption of public access to the entirety of the Sealed Records under either the common law or the First Amendment?

Suggested Answer: No.

3. If Defendants can meet their burden of overcoming the public right of access to some portion of the Sealed Records, must continued sealing be narrowly tailored and supported by specific, on-the-record factual findings demonstrating the existence of countervailing interests sufficient to overcome the public right of access?

Suggested Answer: Yes.

ARGUMENT

I. The Inquirer's Motion to Intervene Should be Granted.

Rule 24 of the Federal Rules of Civil Procedure governs non-party intervention in civil lawsuits. "[E]very court of appeals to have considered the matter," including the Third Circuit, "has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of

challenging confidentiality orders." *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (citing *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (collecting cases)). Indeed, it is well established that the public has a right to intervene in order to challenge efforts to seal records. *See, e.g.*, *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167-78 (3d Cir. 1993); *Littlejohn*, 851 F.2d at 677-78. Consistent with well-established practice, The Inquirer should be permitted to intervene for this same purpose, as it seeks to vindicate the public's right to access the Sealed Records.

II. The Sealed Records Should Be Unsealed.

Consistent with the public's well-settled presumptive right of access to judicial records, The Inquirer respectfully requests that the Sealed Records be unsealed. To the extent the Court determines that any party seeking continued sealing of any portion of the Sealed Records has met its burden to show that such sealing is warranted, The Inquirer respectfully requests that such sealing be both narrowly tailored and explained in sufficiently detailed, on-the-record findings.

A. The Public Right of Access to Judicial Records in Civil Cases.

i. The Common Law Right of Access.

The Third Circuit has long recognized a public right of access to civil proceedings and records rooted in common law. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067 (3d Cir. 1984); *see also Nixon v. Warner Commcn's, Inc.*, 435

U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."). The existence of this right, which antedates the Constitution, is "beyond dispute." *Littlejohn*, 851 F.2d at 677-78 (citations omitted); *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019). This presumption of access to judicial records serves numerous functions; among other things, it assures that the public has a "more complete understanding of the judicial system." *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (citations omitted). And the right "promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court." *Littlejohn*, 851 F.2d at 678.

"Whether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record.'" *Cendant*, 260 F.3d at 192 (citation omitted). "The status of a document as a 'judicial record,' in turn, depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings." *Id.*; *see also Bank of Am.*, 800 F.2d at 344-45 (holding that the presumption of public access applied to a settlement agreement filed with the court because "[o]nce a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records"); *Westinghouse*, 949 F.2d

at 661 (finding that the common law right of access attaches generally "to 'motions filed in [civil] court proceedings'" (citation omitted)).

Under Third Circuit precedent, the right of access applies with particular force to documents and evidentiary materials submitted in support of summary judgment, regardless of the disposition of that motion. *See Westinghouse*, 949 F.2d at 661-63; *Avandia*, 924 F.3d at 672, 674. This is because the disposition of a dispositive motion "shape[s] the scope and substance of the litigation." *Westinghouse*, 949 F.2d at 660; *see also Bank of Am.*, 800 F.2d at 344 (explaining that a court's "action on a motion [is a] matter[] which the public has a right to know about and evaluate"); *Mine Safety Appliances Co. v. N. River Ins. Co.*, 73 F. Supp. 3d 544, 559 (W.D. Pa. 2014) (holding that "the need for public scrutiny is at its zenith when the motion is dispositive").

The strong common law presumption of access "does not permit the routine closing of judicial records to the public." *Miller v. Indiana Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994). A "party seeking to seal any part of a judicial record bears the heavy burden of showing that 'the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Id*. (quoting *Publicker*, 733 F.2d at 1071). Such injury must be shown with specificity. *Cendant*, 260 F.3d at 194. "Broad allegations of harm, bereft of specific examples or articulated reasoning, are

insufficient." *Id*.; *see also Avandia*, 924 F.3d at 679 (noting that courts may not seal judicial records that may cause "[m]ere embarrassment" because such "is insufficient to overcome the strong presumption of public access inherent in the common law right"); *Publicker*, 733 F.2d at 1074 (distinguishing trade secrets, protection of which may overcome the right of access, from "bad business practices," protection of which may not overcome the right of access); *United States v. Criden*, 681 F.2d 919, 922 (3d Cir. 1982) (clarifying that while significant privacy interests may sometimes justify some sealing, information that is unflattering, false, or merely embarrassing does not "rise to the level of 'intensified pain'" that justifies withholding access).

A "party who seeks to seal an *entire* record faces an even heavier burden." *Miller*, 16 F.3d at 551 (concluding that "such an unusual step" must be necessitated by "compelling countervailing interests"). "[C]ompelling countervailing interests" must also be shown to justify sealing records in civil litigation that "has a component of heightened public interest." *Mine Safety Appliances*, 73 F. Supp. 3d at 561-62 (explaining that a heightened standard applies where the public has a "heightened need for judicial transparency"); *Avandia*, 924 F.3d at 677 (explaining that the presumption of access is especially strong in a case that "implicates the public's trust in a well-known and (formerly) widely-used drug"); *see also Cendant*, 260 F.3d at 194.

ii. The First Amendment Right of Access.

The public right of access to civil proceedings and records is also protected by the First Amendment. *Publicker*, 733 F.2d at 1070; *Avandia*, 924 F.3d at 671-73. "Two complementary considerations" govern whether a particular judicial proceeding or court document is subject to the First Amendment presumption of access. *Press-Enter. Co. v. Super. Ct.*, 478 U.S. 1, 8-9 (1986) ("*Press-Enterprise II*"). The first is whether it is the type of judicial proceeding or record that has "historically been open to the press and general public." *Id*. (explaining that a "tradition of accessibility implies the favorable judgment of experience[]" (citations omitted)). The second is "whether public access plays a significant positive role in the functioning of the particular process in question." *Id*; *see also United States v. Wecht*, 537 F.3d 222, 233-43 (3d Cir. 2008) (explaining and applying the *Press-Enterprise II* "experience and logic" test).

Though the parameters of the First Amendment right of access are not well-defined in this Circuit, *see Cendant*, 260 F.3d at 198 n.13, other jurisdictions have recognized its application to motions for summary judgment and materials submitted therewith. *See, e.g., Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (applying both the First Amendment and common law rights of access and holding that "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most

compelling reasons" (citation omitted)); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988) (holding that the First Amendment right of access applies to "documents filed in connection with a summary judgment motion in a civil case"); *see also Avandia*, 924 F.3d at 680 (declining to reach constitutional question); *id.* at 683 (Restrepo, J. concurring) ("Given the increasing frequency with which district courts utilize summary judgment to resolve federal civil litigation, in my view, the First Amendment public right of access that this Court extended to 'records of civil proceedings' also extends to documents submitted in connection with motions for summary judgment." (citations omitted)).

Where the First Amendment right applies, it may be overcome only if "the record . . . demonstrate[s] 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Publicker*, 733 F.2d at 1073 (quoting *Press-Enterprise II*, 478 U.S. at 9).

iii. Access to Discovery Material.

In contrast to the standards applicable to maintaining judicial records under seal, a party seeking a protective order applicable to discovery material pursuant to Federal Rule of Civil Procedure 26(c) must demonstrate "good cause" for that protection. *Shingara v. Skiles*, 420 F.3d 301, 305-06 (3d Cir. 2005) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). To establish "good cause," the moving party must "specifically demonstrate[] that disclosure will

cause a clearly defined and serious injury." *Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citing *Pansy*, 23 F.3d at 786).[2] This standard, however, is "analytically distinct" from the right of access applicable to judicial records because the "right of access begins with a thumb on the scale in favor of openness." *Avandia*, 924 F.3d at 672, 676 ("the *Pansy* factors are not sufficiently robust for assessing the public's right to access judicial records"). In other words, the showing of "good cause" adequate to justify entry of a protective order shielding discovery material under Rule 26(c) cannot justify sealing judicial records. *Bank of Am.*, 800 F.2d at 343-44 (distinguishing sealing of judicial records from "entering a protective order limiting disclosure of the products of pretrial discovery").

The Third Circuit has held that, where parties have entered into a protective order covering material obtained in pretrial discovery, public access to such discovery material filed in conjunction with a "discovery motion," such as a

[2] Factors a district court may consider when determining whether "good cause" justifies entry of a protective order under Rule 26(c) include: (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether the disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefitting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public. *Glenmede*, 56 F.3d at 483 (citing *Pansy*, 23 F.3d at 787-91).

motion to compel, is evaluated by the same "good cause" standard. *Leucadia*, 998 F.2d at 164-66 (explaining its reluctance to "make raw discovery, ordinarily inaccessible to the public, accessible merely because it had to be included in motions precipitated by inadequate discovery responses or overly aggressive discovery demands"). This narrow exception to the otherwise "pervasive common law right" of access to civil judicial records requires district courts, "in the first instance," to "protect the legitimate public interest" in access to discovery materials filed with the court "from overly broad and unjustifiable protective orders agreed to by the parties for their self-interests." *Id*. at 161, 165.

Nothing on the public docket in this matter indicates that any of the Sealed Records are related to discovery motions, and thus it is "the exacting common law right of access standard, including the 'strong presumption' of access," that should be considered in this matter, not the lesser "good cause" standard. *Avandia*, 924 F.3d at 675.

iv. Procedural Requirements for Sealing Judicial Records.

Prior to sealing a record, a court must provide the public with reasonable notice and "an opportunity for interested third parties to be heard." *Miller*, 16 F.3d at 551. Then, before closing records from public view, a court must "articulate[] the compelling countervailing interests" that justify closure and make "specific findings" that closure is necessary. *Cendant*, 260 F.3d at 194, 198 (citation and

internal marks omitted). These findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. Co. v. Super. Ct.*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Miller*, 16 F.3d at 551-52; *Mine Safety Appliances*, 73 F. Supp. 3d at 560 n.3.

B. Defendants Cannot Meet Their Burden to Justify Continued Sealing of the Sealed Records in this Case.

The scope of the common law right of public access to civil judicial records is broad and it encompasses the Sealed Records filed with the Court in this case. *Cendant*, 260 F.3d at 194. The presumption of openness applies to motions to seal judicial records and supporting memoranda of law. *Bank of Am.*, 800 F.2d at 343-44 (stating that the Third Circuit has "held that the common law presumption of access encompasses . . . all 'civil trials and records[,]'" including "motions filed in court proceedings" (citation omitted)). Indeed, as discussed above, public access to judicial records of this kind is necessary for the press and the public to have an opportunity to object to sealing, and is a prerequisite to the public's understanding of both the reasons for sealing urged by the party that filed the motion, and the court's ultimate substantive decision to seal or not to seal court records. *See id*. at 344-45; *Littlejohn*, 851 F.2d at 678.

As to the Sealed Records reflected at docket entries 160, 161, 176, and 203, which were submitted in support of or in opposition to Defendants' MSJ, the public right of access applies with particular force. *Westinghouse*, 949 F.2d at

660-61; *Avandia*, 924 F.3d at 672, 674. Continued sealing of those judicial records implicates not only the common law right of access, but the First Amendment right of access as well. *See Publicker*, 733 F.2d at 1070; *see also Rushford*, 846 F.2d at 253. Accordingly, those records must be unsealed absent "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Publicker*, 733 F.2d at 1073 (citation omitted).

Though the precise nature of many of the remaining Sealed Records at issue—namely, docket entries 127, 135, 173, 174, 176, 196, 204, and 205—is unclear from the public docket, given the "pervasive" nature of the common law right, *Leucadia*, 998 F.2d at 161, those records too must be unsealed absent, at a minimum, a particularized showing that "the material is the kind of information that the courts will protect" and that disclosure will cause "a clearly defined and serious injury." *Miller*, 16 F.3d at 551 (quoting *Publicker*, 733 F.2d at 1071); *see also Milhouse v. Ebbert*, 1:15-CV-00013, 2017 WL 5484014, at *2 (M.D. Pa. Nov. 15, 2017).

The public interest in this case is uniquely strong. The Milton Hershey School is the nation's wealthiest charitable boarding school. Children from lower income families from across Pennsylvania and the country are entrusted to its care. The Hershey Trust, which oversees the Milton Hershey School, has in recent years faced a series of controversies that have prompted criticism and calls for increased

public oversight. *See* Pablo Eisenberg, *Hershey School Scandal Underscores Need for Watchful Governance*, Chronicle of Philanthropy (Sept. 14, 2011), https://perma.cc/9XM7-5FAE; Eric DuVall, *Hershey Trust agrees to changes amid allegations of corruption*, United Press Int'l (July 23, 2016), https://perma.cc/MX3M-PSD6. This lawsuit, in particular, has sparked intense public interest in light of its allegations that the school was responsible for the death of a student previously in its care. *See*, *e.g.*, Bob Fernandez, *Did the Hershey School reject students for depression? Two suits say yes*, Phila. Inquirer (June 30, 2016), https://perma.cc/X6MV-DP4T; Victor Fiorillo, *Is Milton Hershey School to Blame for Abbie Bartels' Suicide*?, Phila. Magazine (July 1, 2016), https://perma.cc/37AV-NMB4. Given the "heightened public interest" in this lawsuit, sealing of any judicial records can only be justified by "compelling countervailing interests." *Mine Safety Appliances*, 73 F. Supp. 3d at 561-62; *see also Avandia*, 924 F.3d at 672, 674.

Yet no on-the-record findings establish any basis, let alone a "compelling countervailing interest," that would justify maintaining the seal over the Sealed Records.[3] Given the strong presumption in favor of access to judicial records—a

[3] "Even if the initial sealing was justified, when there is a subsequent motion to remove such a seal, the district court should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail." *Miller*, 16 F.3d at 551-52. Here, because Defendants'

presumption that is only strengthened by the heightened public interest in this case—as well as the absence of any "compelling countervailing interests to be protected" and any "specific findings on the record concerning the effects of disclosure," the Sealed Records should be unsealed. *Miller*, 16 F.3d at 551.

C. ECF 203-1 Should Also Be Unsealed for the Separate, Independent Reason That It Was Already Publicly Disclosed.

With respect to the exhibit at docket entry 203 (ECF 203-1), which was submitted by Plaintiffs as Exhibit 71 in opposition to Defendants' MSJ, that document also cannot be maintained under seal for the additional reason that it was *already* made available to the public. As explained above, The Inquirer obtained a copy of that document from PACER; it was later apparently resealed by the Court. Fernandez Decl., ¶¶ 4-5. As the Third Circuit has explained, however, such retroactive sealing is both ineffectual and improper. "Public disclosure cannot be undone"; courts "'simply do not have the power . . . to make what has thus become public private again.'" *Constand v. Cosby*, 833 F.3d 405, 410 (3d Cir. 2016) (quoting *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 (2d Cir. 2004)) (dismissing appeal as moot where litigant sought to have unsealed, publicly disclosed documents "resealed").

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memoranda of law in support of their motions for leave to file documents under seal in this matter are themselves under seal, ECF 134, 159, 195, it is unclear what reasons—if any—were offered by Defendants as initial justifications for sealing.

Because the PHRC's "Finding of Probable Cause" was already publicly disclosed, it cannot now be kept under seal. Once "[t]he genie is out of the bottle" the court has "not the means to put the genie back." *Gambale*, 377 F.3d at 144; *see also, e.g.*, *Wash. Post v. Robinson*, 935 F.2d 282, 291 (D.C. Cir. 1991) (holding that the plea agreement of a cooperating witness must be unsealed when the fact of the witness's cooperation "was already within the public knowledge"); *see also In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (stating that factors to be weighed in determining whether the common law right of access had been overcome include "whether the public has already had access to the information contained in the records" (citing *Nixon*, 435 U.S. at 597-608)). For this reason, too, ECF 203-1 must be unsealed.

III. To the Extent Continued Sealing Is Proper, Such Sealing Should Be Narrowly Tailored and Supported by Specific, On-the-Record Findings.

Even assuming, *arguendo*, that the parties can satisfy their burden to demonstrate a compelling countervailing interest sufficient to overcome the public right of access, sealing of the Sealed Records should be no broader than necessary to "serve that interest." *See Press-Enterprise I*, 464 U.S. at 510; *see also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (narrow tailoring "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy"). Thus, even assuming that continued sealing of some portion of the Sealed Records is justified, limited

sealing and/or redaction—not continued sealing of all of the Sealed Records in their entirety—is warranted. *See Press-Enterprise I*, 464 U.S. at 510.

In addition, as the Third Circuit has made clear, if the Court finds that continued sealing of any portion of the Sealed Records is justified, long-standing precedent requires the Court to "articulate[] the compelling countervailing interests to be protected, [make] specific findings on the record concerning the effects of disclosure, and provide[] an opportunity for interested third parties to be heard." *Miller*, 16 F.3d at 551; *see also Avandia*, 924 F.3d at 672-74. Those findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

CONCLUSION

For the reasons set forth above, The Inquirer respectfully requests that the Court grant its motion to intervene and enter an order requiring the Clerk of the Court to immediately unseal the judicial records reflected at docket entries 127, 135, 160, 161, 173, 174, 176, 196, 203, 204, and 205.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.8(b)

This brief complies with the word count limitation of Local Rule 7.8(b) because it contains 4,968 words.

/s/ Michael Berry
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